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January 17, 2022

OUR TOP STORY

Was supervisor able to show his decision was based on sound business reasons?

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7 questions to ask yourself before deciding whether to fire someone

INSIDE

Firing turns into gender bias lawsuit – boss on the hot seat

Offering equal opportunities to men and women

"Kathy, I just got your test results back and I'm sorry to say, you did a bit worse than I had hoped you would," Supervisor Brett McDonald said.

"Exactly how worse is a bit worse?" Kathy asked, anxiously.

"You came in below the 80% cutoff," Brett said. "And as you are well aware, when the test result is below an 80, usually we just part ways."

"Usually … but not always," Kathy said. "You have guys here who scored below an 80, and you kept them and trained them, and they're still working here.

"So how about it?" she asked. "Give me a chance to prove myself."

Not in your case

"I'm afraid I can't," Brett said. "Not in your case. You didn't make the cut."

"Are you doing this because I'm a woman?" Kathy asked.

"Please don't try to conflate the issue," Brett said. "This has nothing to do with you being a woman. This is based solely on your test score."

"Oh c'mon, Brett," she shot back. "Why

*Please see **Hot seat …** on Page 2*

Sharpen Your Judgment

Timing of 'treatment' plan creates work conflicts

"Hi, Lynn, sorry to interrupt. Do you have a minute to talk?"

HR manager Lynn Rondo looked up from her computer screen and saw employee Becca Martinez standing in her doorway.

"Sure, Becca. Come on in," Lynn said. "What can I do for you?"

"I wanted to modify my work schedule a little so I can leave at 4 p.m.," Becca said. "There's a yoga class I need for treatment for my back."

"Did your doctor recommend this class?" Lynn wanted to know.

"No, he just wants me to exercise and this class is cheap and close by. Plus, the instructor is really great," Becca said.

"Leaving an hour early won't work," Lynn said. "Can't you find a class after work?"

Too busy

"I have busy evenings," Becca said. "It has to be this class, or I won't get this instructor."

"I'm sorry," Lynn said. "But unless you have documentation requiring you to go to this class, I don't see how we can allow you to leave that early. It's not reasonable."

Becca sued the company. She said stopping her from attending the yoga class was a violation of her ADA right to an accommodation.

The company fought to get Becca's disability discrimination lawsuit dismissed. Did it win?

This regular feature sharpens your thinking and helps keep both you and your firm out of trouble. It describes a real legal conflict and lets you judge the outcome.

Make your decision, then please turn to Page 4 for the court's ruling.

Hot seat …

(continued from Page 1)

were you going around behind my back, asking people here about my divorce?"

Trying to be supportive?

"Because you told everybody here that you were meeting with a lawyer," Brett explained.

"I was trying to find out what was really going on with you, because you weren't being very forthcoming.

"I was only trying to be supportive," he insisted.

"Oh no you weren't," Kathy said. "Your only concern seemed to be that I might end up as a divorced and single parent with custody, and how that might affect my work schedule," she said.

"I overheard what you said about single moms in the break room."

Personal opinions

"I apologize for what you heard in the break room," Brett said.

"I would never allow something like my personal opinion to influence any employment decisions I make," he said.

"Oh you say that now," Kathy said. "But I know what I heard. And I know what you're doing here.

"If a guy does poorly on the test, he gets a second shot.

"But if a woman doesn't score above an 80, she's out the door, no exceptions," she said angrily.

Resigns … and sues

Kathy resigned from her job, and shortly afterward, she sued her former employer for discrimination, claiming bias against women and bias against single moms.

In short, she said men were granted more favorable treatment, and she was being told she could not be successful because she was a mother.

Decision: The employer lost.

A jury found the employer used inconsistent standards, one for men and another for women, and ordered it to pay $2.5 million in damages to the former employee.

Key: Whether it's a choice for a job assignment or a promotion, it's critical for supervisors to be sure they offer equal opportunities to men and women. When in doubt, check with your HR department.

It is unlawful to have one hiring and promotion policy for woman, and another for men.

For example, an employer may not refuse to hire married women or women with children if it hires married men or men with children.

Case: Maher v. City of Fresno.

What you need to know:

Sex discrimination involves treating someone (an applicant or employee) unfavorably because of that person's sex, including the person's sexual orientation, gender identity, or pregnancy.

- The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.
- A policy that applies to everyone, regardless of sex, can be illegal if it has a negative impact on a certain sex and is not job-related or necessary to the operation of the business.

TEST YOUR KNOWLEDGE

Knowing and documenting adverse actions you take

As a supervisor, you want to have solid documentation to support the personnel decisions you make. That's especially true when you need to take an adverse action against an employee.

Adverse actions are the kinds of decisions that tend to draw legal challenges from employees. To test your knowledge of adverse actions, respond *Yes* or *No* to the following:

1. For various reasons, you decide to demote an employee by taking away some authority, but not decreasing the employee's pay. Is this an adverse action?
2. Because of an unexpected increase in workload, you require some employees to work longer days. Is this an adverse action?
3. You transfer an employee to a less desirable location or position. Is this an adverse action?

ANSWERS

Answers to the quiz:

1. *Yes.* The definition of demotion isn't limited to just pay, so a decrease in authority is almost always considered an adverse action. As such, you'll want to be sure to have in writing the performance-based reasons for the employee's demotion.
2. *No.* While targeting just one employee to work longer hours could, in some instances, be viewed as an adverse action, the legitimate need to have some employees work longer hours, with proper OT pay if necessary, is generally not going to be seen as an adverse action.
3. *Yes.* Courts and the EEOC have recognized that a transfer to a less desirable position or location could be seen as an adverse action. You want to document the reasons for the transfer, because employees will sometimes claim the transfer was discrimination or retaliation.

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Where other supervisors went wrong

News you can use to head off expensive lawsuits

This feature highlights violations of workplace laws. You can learn how other supervisors got off track, what the mistakes cost and how to avoid them.

Ambulance outfit pays $451K for retaliation

What happened: MedicOne, of Farmers Branch, TX, which operates ambulance services in Mississippi and Illinois, allowed supervisors and members of upper management to sexually harass several female paramedics and retaliated against a female paramedic by firing her for complaining about the sexually hostile work environment, according to a lawsuit filed by the EEOC.

Decision: MedicOne agreed to settle the lawsuit for $451,000, and to conduct annual training on sexual harassment in the workplace, and establish a toll-free number that employees can use to safely report workplace discrimination.

Cite: EEOC v. MedicOne.

Firm hit for religious discrimination; pays big

What happened: Arthur J. Gallagher & Co., a worldwide insurance brokerage and risk management firm, violated federal anti-discrimination laws when it fired a client underwriting associate in its Centennial, CO, office in 2019, according to the EEOC.

The firm was aware an employee's Christian religious practices included fasting in conjunction with Lent. Yet the company issued the employee a termination memo citing the "fasting" and "meditating" among the reasons for firing the employee.

Decision: Gallagher agreed to pay the fired employee $40,000, will provide anti-discrimination training to managers in its Midwest region, and provide annual reporting to the EEOC. The federal court will retain jurisdiction over the agreement and see it is enforced.

Cite: EEOC v. Arthur J. Gallagher & Co.

Payroll firm pays $95K for disability discrimination

What happened: Employer Solutions Group, LLC (ESG), a payroll services company operating in Eden Prairie, MN, fired an employee because she notified the company that she needed to use crutches following a surgery related to a knee injury.

When the employee attempted to return to work following an approved medical leave, ESG asserted that she needed to be 100% healed before returning to work and cited her need for an "ambulatory aide" as a reason for her termination.

Decision: Along with agreeing to pay $95,000 to settle the lawsuit brought by the EEOC, ESG agreed to eliminate any policy or practice of requiring individuals to be released without restrictions or 100% healed in order to work.

The consent decree also requires training on the ADA for both management personnel and other employees and requires ESG to report any further disability discrimination complaints to the EEOC during the term of the decree.

Cite: EEOC v. Employer Solutions Group, LLC.

STOP, LOOK, LISTEN ...

People are back in the building and so is conflict

When faced with conflict, avoid trying to make others change their minds.

Instead, try to be receptive.

- Recognize the others' perspectives. Show you're engaged, even interested, by saying, "I understand that …" or "I believe what you're saying is …." Then add, "Thank you because …." Explain what you understand, proving you listened and want to talk with purpose, not argue.
- Hedge your claims. You don't need to be overly assertive, or conversely, tentative, with your views. Take the middle road. Avoid soft words, such as "might," and harsh words, such as "must." State your view simply.
- Be positive with your argument. For instance, avoid statements such as, "We should not …" or "You can not …" Better: "Let's consider the benefits of …" or "We might find positive results by considering …."
- Focus on agreement. In conflict, it's easier to focus on where we disagree – and become defensive. Instead, find a small, shared value and comment. For instance, "I agree we both want this pandemic to end."

When you must step in:

- Ask three questions. 1) What do you want me to know? 2) How might I help here? 3) Should the three (or more) of us talk privately? The answers will reveal how to move forward – or if you even need to do any more than hear the answers.
- Pick your solution. If the problem is venting, let it be. For misunderstandings, opposing priorities, differing goals and personality conflicts, you'll want to talk and work through them. Get HR involved with toxic behavior.
- Schedule the finish. Set up a time in the future when you all can review what happened, how it was resolved and check everyone followed through on commitments and responsibilities.

SUPERVISORS SCENARIO

How much can a supervisor ask about retirement – without risking age bias claims?

'You keep asking … because you're pushing me out the door'

"Are you counting down the days until your retirement yet?" Supervisor Cathy Jones asked.

"It's the 15th of next month, right?"

"I meant to tell you – our condo won't be done in time," replied Nancy Wilkins.

"That means we'll stick around for a little longer – and I'll be able to work for a couple more months."

"Uh, that's a problem," Cathy said.

"You know we've always done everything we can to help," Cathy said.

"First, we let you work from home two days a week because of your long commute.

"Then it was a four-day workweek – and working from home three of those days.

"We said we could put up with that for a while, but we really need someone here every day," Cathy said.

"I figured we could manage until you retired – but we can't wait much longer."

"I see what's going on," Nancy said.

"You keep asking about my retirement because you're pushing me out the door.

"You probably have some young person already lined up for my job.

"Forget it – I'm not ready to go!"

An attitude problem

Later that day, the company told Nancy she had a bad attitude and let her go. Nancy sued under the Age Discrimination in Employment Act, saying the questions and comments about her retirement created a hostile workplace.

Decision: The company won when the judge dismissed the case, saying that asking someone about when they planned to retire was not discriminatory.

Key: There are times when a supervisor needs to ask employees questions about retirement, or other issues that impact budget and staffing.

As long as those questions are asked for legitimate business reasons, and not meant to target the person unfairly, they normally won't rise to the level of bias.

Case: Abell v. American Bird Conservancy.

What you need to know:

Preventing charges of age discrimination is a real challenge for supervisors, as today's workforce ages.

It can help to:

- Spend less time documenting defenses against possible age bias suits and more time proactively minimizing them.
- Actively develop ways to show your senior people they are valued.
- Remember today's comments might face greater scrutiny later. Think now, "How would this sound to a judge?"

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

Yes. The company won when a court dismissed Becca's disability discrimination lawsuit.

Becca's attorney tried to argue that since exercise was part of her treatment, the company was legally bound to accommodate that. She asked for an accommodation, and should've received one, her attorney said.

But the court disagreed. Since Becca admitted that "exercise in general" was the only thing her doctor prescribed, the company wasn't obligated to make sure she could go to a specific yoga class during work hours.

The court added that a company generally doesn't need to modify operations solely for the convenience of an employee.

This case highlights that employers have a key role in deciding which accommodations to implement. While leaving early was Becca's preferred accommodation, it wasn't reasonable to her employer.

What's reasonable?

Employees' first choice of accommodations should be considered, but an employer is within its rights to suggest another reasonable option. In this case, it was more reasonable for Becca to find a different class to attend.

Still, being flexible with employees can go a long way to keep them happy and possibly prevent lawsuits like this.

Case: Flynn v. McCabe & Mack LLP.

EDITOR: RICH HENSON

ASST. EDITOR: RACHEL MUCHA

MANAGING EDITOR: TOM D'AGOSTINO

PRODUCTION EDITOR: JEN ERB

EDITORIAL DIRECTOR: CURT BROWN

Subscriptions: 800-220-5000

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